SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. [redacted] 110

NATIONAL WOODWORK MANUFACTURERS ASSOCIATION, et al.,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

CHARLES B. MAHIN,
134 South La Salle Street,
Chicago, Illinois 60603,
Counsel for Petitioners.

Of Counsel:
RICHARD S. RATCLIFF,
JOHN A. McDONALD,
SPRAY, PRICE, HOUGH & CUSHMAN,
Chicago, Illinois 60603.

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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

National Woodwork Manufacturers Association, Hardwood Products Corporation, and Mohawk Flush Doors, Inc. (herein called "NWMA," "Hardwood," and "Mohawk," respectively), Petitioners, pray that a writ of certiorari issue to review a certain part of the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled case on November 17, 1965.

CITATIONS TO OPINIONS BELOW.

The Decision and Order of the National Labor Relations Board (herein the "Board"), printed in the Joint Appendix* (J. A. 2-36), is reported in 149 NLRB No. 65, 57 LRRM 1341 (1965). The opinion of the Circuit Court of Appeals, printed in Appendix B hereto (*infra*, pp. 26-35), is reported in 354 F. 2d 594 (C. A. 7, 1965).

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on November 17, 1965 (*infra*, p. 26). Timely motions for rehearing, filed by Petitioners and the Board were denied on January 24, 1966 (*infra*, p. 36). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

Whether a jobsite contractor's legal freedom ("control") to submit to a union's boycott of prefabricated products made by other employers immunizes boycott conduct otherwise violative of Section 8(b)(4)(B) of the National Labor Relations Act (herein the "Act").

Whether in a product boycott case a "primary dispute" between a union and a jobsite employer for an objective of work preservation conclusively negates the existence of a proscribed objective under Section 8(b)(4)(B) of the Act.

Whether the "primary strike or primary picketing"

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* The respective parts of the printed record below are referred to as Joint Appendix—"J. A."; National Woodwork Manufacturers Association Supplemental Appendix—"NWMA S. A."; National Labor Relations Board Supplemental Appendix—"Bd. S. A."; and Metropolitan District Council Supplemental Appendix —"Council S. A."

proviso, which was added to Section 8(b)(4)(B) in the 1959 amendments, validated product boycotts of a type theretofore unlawful under that section.

STATUTE INVOLVED.

The statutory provision involved is Section 8(b)(4)(B) of the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 U. S. C. § 151, et seq., which provides as follows:

> "(b) It shall be an unfair labor practice for a labor organization or its agents—
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> "(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:
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> "(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing."

STATEMENT.

Upon charges filed on June 13, 1963, by the Petitioners,* the Board issued its complaint on August 27, 1963, and its amended complaint on October 4, 1963, alleging that the Metropolitan District Council of Philadelphia and Vicinity of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO, and others (herein the "Council" or "Union"), violated Section 8(b)(4)(A), Section 8(b)(4)(B), and Section 8(e) of the Act. The gravamen of the complaint was that the Council refused to install certain prefabricated doors on four construction jobs in the Philadelphia area known as the Coatesville Hospital, North Junior High School, St. Aloysius Academy and Naval Capehart Housing (herein "Frouge") jobs, and that the Council entered into and maintained an agreement known as Rule 17, which prohibited the handling and installation of prefabricated doors and other products in its jurisdictional area.

Following a hearing before the Board's Trial Examiner and the Trial Examiner's Decision dated February 7, 1964, the Board, on November 12, 1964, summarily adopted the Trial Examiner's Decision and issued its Decision and Order dismissing all charges of violation, except only the charge of violation with respect to the Council's conduct on the first three aforementioned construction jobs, which the Board found to violate Section 8(b)(4)(B) of the Act. The Board found that the Council's refusal to install or handle prefabricated doors on the Frouge job did not violate Section 8(b)(4)(B), that Rule 17 did not violate Section 8(e), and that there was no violation of Section 8(b)(4)(A).

Upon Petitioners' petition for review filed November 30, 1964, the Council's petition for review filed January 14,

* Charges were also filed by Charles B. Mahin, an individual.

1965,* and the Board's petition for enforcement filed January 21, 1965, and after consideration of briefs and upon oral argument, the Court below, on November 17, 1965, issued its opinion and judgment affirming the Board's findings with respect to Section 8(b)(4)(B) and reversing the Board's finding of no violation with respect to Section 8(e) and Section 8(b)(4)(A). As stated, timely motions for rehearing filed by Petitioners and the Board were denied on January 24, 1966.

Petitioners here seek review of that part of the Court's judgment finding that the Council's boycott of prefabricated doors on the Frouge job did not violate Section 8(b)(4)(B).

The basic facts are not materially in dispute. Prefabricated products, such as are involved herein, are doors which are machined, processed and finished in various ways at the plants where they are manufactured. The use of such doors saves time and money (*infra*, p. 28; J. A. 58-59). The use of prefabricated doors has been greatly increasing in the construction industry, and this is true of numerous other building components, such as windows, factory-built trusses, wall and partition assemblies, prefinished paneling, prefabricated kitchens and bathrooms, and on up to the point of prefabricated houses and other buildings (*infra*, pp. 28-29).

Throughout its jurisdictional area, the Council enforced Rule 17, which in pertinent part provides (J. A. 121-123):

> "No member of this District Council will handle material coming from a mill where cutting out and fitting has been done for butts, locks, letter plates, or hardware of any description, nor any doors or transoms which have been fitted prior to being furnished on job. . . ."

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* The Council's petition was filed in the United States Court of Appeals for the Third Circuit but, prior to April 26, 1965, was transferred to the Seventh Circuit.

This rule bars from Philadelphia virtually all prefabricated millwork units, including prefabricated and prehung doors.

The four jobs on which the Council banned prefabricated doors under its Rule 17 were (J. A. 11-16):

(1) The Coatesville Hospital job of contractor Driscoll, where the Council prevented the installation of 170 factory-finished architectural doors made by Hardwood Products Corporation of Neenah, Wisconsin. The owners' specifications for this job called for factory-finished doors.

(2) The North Junior High School job of contractor McDonnell, where the Council banned the use of 235 architectural doors also made by Hardwood. The specifications here called for factory-finished architectural doors.

(3) The St. Aloysius Academy job of contractor Nason, where the Council prohibited the use of 182 doors made by Oxford Plastic Products Company, Oxford, Pennsylvania. The specifications for this job called for formica-clad architectural doors.

(4) The Naval Capehart Housing Project of contractor Frouge, where the Council prevented the use of 3,600 factory-machined doors made by Mohawk Flush Doors, Inc., with plants in South Bend, Indiana, and Sunbury, Pennsylvania. The Government specifications on this job permitted but did not require factory-finished doors, and Frouge ordered them to save time and expense.

The Court below held that the Council's product boycott on the three first-named jobs violated Section 8(b)(4)(B) because the *target* clearly was the owners and distributors of the prefabricated doors. The Court, however, affirmed the Board's holding that there was no violation of Section 8(b)(4)(B) on the Frouge job (*infra*, pp. 30-31).

The *only* difference between the situations on the first three jobs, which the Court found violative of Section 8(b)(4)(B), and the situation on the Frouge job, where the Court found no violation, was that the prefabricated doors were specified by the owners on the first three jobs, whereas the prefabricated doors were not specified by the owner on the Frouge job.

Despite its conclusion that the Council's target and objective on the first three jobs was clearly the prefabricated doors, the Court adopted the Board's conclusion that on the Frouge job the Council's sole objective was "work preservation" and that the Council's refusal to install the prefabricated doors involved only a "primary" dispute with contractor Frouge. The result was reached by the application of the Board's new "control" rationale—i.e., since the doors were *not required* by the job specifications, Frouge, and not the prefabricated doors and the manufacturers, was deemed to be the *sole target* of the Council (*infra*, p. 30).

The validity of this artificial distinction is the crux of the question of which Petitioners seek review.

REASONS FOR GRANTING THE WRIT OF CERTIORARI.

The Council in this case engaged in a comprehensive boycott campaign to eliminate the use of prefabricated doors in the Philadelphia construction area. Union Rule 17 (*supra*, p. 5) expressly and bluntly prohibited the installation of prefabricated doors within the Council's jurisdiction. This was the typical form of product boycott which, until recent decisions of the Board and the decision of the Court below, has consistently been held illegal since the Taft-Hartley Act was enacted in 1947.*

* This marked change in the thinking of the Board is illustrated by the fact that the General Counsel for the Board, in accordance with his understanding of the law only three years ago, filed the

It is undisputed that on all four jobs the contractors bought prefabricated doors, and that on all four jobs the Union applied Rule 17 to prevent the use of the prefabricated doors. The only way the Union's goal could be accomplished was by forcing all contractors, *including Frouge*, not to use the doors—and this was done on all four jobs.

With reference to its findings of violation of Section 8(b)(4)(B) on the three first-named jobs, the Court stated (*infra*, pp. 31-33):

> "The language of the statute and its legislative history clearly indicate that § 8(b) (4) (B) applies to the product boycott carried on by the Union in this case under its rule 17. . . ."
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> "In the case at bar the Union's target was and is prefabricated doors. Neither here nor in Joliet Contractors was there a labor dispute between the union and any manufacturer. In Joliet Contractors we found the union's refusal to install such products to be a violation of § 8(b) (4) (A).[5] At that time the proviso in § 8(b)(4)(B) had not been enacted.

5. Now Known as (B).

In contrast, the Court, finding no violation on the Frouge job, stated (*infra*, pp. 30-31):

> "The Board held that the Union violated §8(b) (4) (i) (ii) (B), by reason of its boycott of prefabricated doors on the Coatesville, North Junior High and St. Aloysius jobs, but as to Frouge, it held otherwise, giving as its reason, that, while in the first three jobs the specifications called for prefabricated doors and hence the Union target was the doors and persons making and distributing them, in Frouge the Union boycotted prefabricated doors which had been purchased by the contractor—but which were *not required*

Board's complaint and prosecuted the case before the Board below on the ground that the Union's boycott on the Frouge job, as well as on the other jobs, violated Section 8(b) (4) (B).

by job specifications. The conclusion seems to indicate that the Board held that the Union's target in Frouge was not the prefabricated doors and their manufacturer but rather contractor Frouge and that the situation involved only a primary dispute with him. We agree."

* * * * *

"We hold that Frouge was the object of a 'primary strike or primary picketing' and therefore the Union was entitled to the protection of the proviso in § 8(b)(4)(B.)."

The rationale of this new immunity for product boycotts, which the Court below summarily adopted, is that if the immediate employer of the boycotting employees has "control" of the purchase (that is, the legal right or ability not to buy the forbidden product), this employer will be deemed conclusively to be the union's target, and the union's sole objective will be deemed to be "work preservation" and the dispute considered only "primary" (*infra*, p. 31; J. A. 28-30). This artificial rationale precludes and negates consideration of other *existent* proscribed objectives. Even if the proof demonstrates conclusively that the union's *real* objective is the prohibition of prefabricated products made by other employers and that this objective is actually accomplished by the union's boycott of such products, this "control" concept, as a matter of law, dictates a finding that "work preservation" is the sole objective, and that only a "primary dispute" is involved.

1. That part of the decision below in which the Court applied the "control" theory to validate the Union's boycott of prefabricated doors on the Frouge job conflicts in basic principle with the decisions of this Court and other courts of appeal, holding that a controlling criterion of violation under Section 8(b)(4)(B) is the *existence* of *an objective* proscribed by that section.

An offense under Section 8(b)(4)(B) (*supra*, p. 3) embodies two basic elements: (1) union inducement of employees or coercion of an employer (2) for *an object* of requiring any person *to cease handling the products of another processor or manufacturer* or to cease doing business with any other person.

In the landmark decision *Labor Board* v. *Denver Building & Construction Trades Council*, 341 U. S. 675 (1951), this Court emphasized that the determination of the union's actual objectives is crucial, and that if *an* objective is proscribed, that is enough—it need not be the sole objective. There the boycotting union contended that it was engaged only in a lawful primary dispute with the immediate employer to enforce closed shop rules for the benefit of its members. The Court held that the union's conduct violated Section 8(b)(4)(A)* because *an* objective was that of forcing one employer to stop doing business with another.** The Court said (pp. 687, 689):

> "At the same time that §§ 7 and 13 safeguard collective bargaining, concerted activities and strikes between the primary parties to a labor dispute, § 8(b)(4) restricts a labor organization and its agents in the use of economic pressure where an object of it is to force an employer or other person to boycott someone else.
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> "A. We must first determine whether the strike in this case had a proscribed object. . . ."
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> "It was an object of the strike to force the contractor to terminate Gould & Preisner's subcontract.

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* Now Section 8(b)(4)(B).

** This principle was reaffirmed the same day in *Electrical Workers* v. *Labor Board*, 341 U. S. 694, 700 (1951), wherein it was stated:

> "The *Denver* case also covers the point that it was sufficient that *an* objective of the picketing, although *not necessarily the only* objective of the picketing, was to force Giorgi to terminate Langer's uncompleted contract and thus cease doing business with him on the project."

"B. We hold also that a strike with such an object was an unfair labor practice within the meaning of § 8(b)(4)(A).

"It is not necessary to find that the *sole* object of the strike was that of forcing the contractor to terminate the subcontractor's contract. This is emphasized in the legislative history of the section. . . . ."

Applying the foregoing principle, the courts of appeals have consistently held that (given requisite inducement or coercion) the crucial determination under Section 8(b)(4)(B) is the existence of *a* proscribed objective—whether or not there are also lawful objectives. Thus, in product boycott cases, the determinative factor is whether *a* union target is the boycott of products made or sold by someone other than the immediate employer. In some product boycott cases, the union refused to handle the banned products because they did not bear a union label or were not made by members of a particular union. But in other major cases, the boycotting union banned the proscribed products as such, regardless of their source, for the purpose of preserving or making work for its members. In all these cases, however, the controlling criterion was held to be the *real* objective—the *real* target of the boycotting union. Given such a proscribed objective (i.e., the boycott of products made by other employers), the existence of other lawful objectives, such as work preservation, was not material.

*Sound Shingle** involved a situation in which an Oregon union had refused to work on lumber from Canadian mills. The boycotting union contended that it had only engaged in a primary dispute with the immediate employer, and that there was no dispute with any Canadian producer and, therefore, "there could be no secondary boycott under the

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* *NLRB* v. *Washington-Oregon S. W. D. C.*, 211 F. 2d 149 (C. A. 9, 1954).

Act.'"* The Ninth Circuit rejected these contentions stating that, under the statute, it is the objective of forcing an employer to stop using the products of another that is determinative** (p. 152):

> "The Union's argument that there was no evidence of a dispute between it and the Canadian plants is without merit. If that were true, it would not make the Union's conduct any more excusable. The prohibited object of the boycott is stated by the statute to be 'forcing * * * any employer or other person to cease using * * * the products of any other producer, processor, or manufacturer * * *.' That is a prohibited object whether the union has or has not a dispute with such 'other producer, processor, or manufacturer.' In fact, if the object is sought, not because of any dispute, but merely because the union dislikes the other producer for any reason, or for no reason, the conduct would appear even more reprehensible. . . ."

Similarly, in *General Millwork**** the Sixth Circuit Court

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* *Ibid*, p. 151.

** Citing *Allen Bradley Co.* v. *Local Union 3, I. B. E. W.*, 325 U. S. 797 (1945); and the Legislative History, the Board in *Sound Shingle Co.*, 101 NLRB 1159, 1161 (1952), below had stated:

> "It is true that in the usual type of secondary boycott there is a dispute with one employer followed by secondary activity against another employer with whom he has business dealings, to force a cessation of business with the primary employer. But because this kind of secondary boycott is more usual or more frequent does not mean that it is the *only* kind Congress intended to reach. We do not believe that, as to the type of conduct now before us, Section 8(b)(4)(A) contemplates the existence of an active dispute, over specific demands, between the union and the producer of the goods under union interdict. The legislative history surrounding the enactment of Section 8(b)(4)(A), while difficult as a guide in many respects, does furnish reasonably clear guidance on the precise issue here. The Senate Committee Report on this section indicates that no demand upon the producer of the boycotted product is necessary to sustain the charge that a union has engaged in the type of 'secondary boycott' we have here under consideration."

*** *NLRB* v. *Local 11, etc.*, 242 F. 2d 932 (C. A. 6, 1957).

of Appeals held illegal a Carpenters Union boycott of prehung doors quite like the Council's boycott of prefabricated doors in the present case. In that case the union was trying to enforce a union rule preserving the hanging of doors for jobsite carpenters.* Although the union had a dispute with the immediate employers about a work-preservation rule and had no dispute with the manufacturers, the Court affirmed the Board's finding of violation because *an object* of the union was *to cause the immediate employers and others to stop handling and using the prefabricated doors.* Judge Stewart (now Justice Stewart) said (pp. 934-935):

> "Substantially adopting the Trial Examiner's Intermediate Report, a majority of the Board found the respondents had induced and encouraged employees of the subcontractors to engage in a concerted refusal to handle the prehung doors, and that objectives of the respondents' conduct were to force or require the subcontractors to cease using prehung doors, to force or require Erie Building Company to cease using and purchasing prehung doors, and to force or require Scholz Homes, Inc., to cease doing business with the manufacturers of the doors. . . ."
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> "The fact that there was not an active labor dispute between the respondents and the producers of the doors would not serve to immunize the respondents from the terms of § 8(b)(4)(A) of the Act, which neither literally nor implicitly requires the existence of such a dispute as a condition of its operation. *N. L. R. B.* v. *Washington-Oregon Shingle Weavers' Dist. Council,* 9 Cir., 1954, 211 F. 2d 149, 152-153."

Except for its departure from precedent in the case of the Frouge job herein, the Court below also has adhered to

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* *General Millwork Corporation,* 113 NLRB 1084, 1094, 1098 (1955). The union also had a rule against nonunion products, but both the Board and the Court relied on the ban against prehung doors as such, as the proscribed objective.

the principle that in product boycott cases the union's actual objective or target is the controlling factor—i.e., whether the union's target is that of forcing the immediate employer or other persons to stop handling or using products made by others. When there is such *an* objective, the existence of work preservation or other lawful purposes is not material.*. In fact, in its finding that the Union violated Section 8(b)(4)(B), by its boycott of prefabricated doors on the Coatesville Hospital, North Junior High School and St. Aloysius Academy jobs, the Court below expressly relied on and followed its earlier decision in the leading product boycott case of *Joliet Contractors Association.*** The Court stated (pp. 597-598):

> "The language of the statute and its legislative history clearly indicate that § 8(b) (4) (B) applies to the product boycott carried on by the Union in this case under its rule 17. In *Allen Bradley Co.* v. *Local Union No. 3, etc.*, 325 U. S. 797, 65 S. Ct. 1533, 89 L. Ed. 1939 (1945), it appeared that Local 3 of the Electrical Workers Union and the Electrical Contractors of New York City had agreed on work rule restrictions, under which Local 3 refused to handle or install electrical fixtures and equipment made or assembled outside the New York City area. It was agreed that, in lieu of absolute prohibition, the union would dismantle and rebuild the 'foreign' equipment or be paid the equivalent thereof. Local 3 had no active labor dispute with the 'foreign' manufacturers, nor did it have any interest in the working conditions at such factories. It was not concerned with whether the 'foreign' fixtures were union made—in fact, it barred fixtures made by its sister local union in New Jersey. *Further, Local 3 was not concerned with whether the immediate contractor had or did not have 'control of the work.'*

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* Attention is invited to *York Corporation*, 121 NLRB 676 (1958), wherein at pages 684 and 685 the above-mentioned cases were discussed at some length and the principles stated reaffirmed.

** *Joliet Contractors Association* v. *NLRB*, 202 F. 2d 606 (C. A. 7, 1953), cert. denied 346 U. S. 824 (1953).

Clearly, the union's ultimate objective was to preserve work for its members. The intermediate objective, as the means to its ultimate goal, was the boycott of foreign products. It was the inadequacy of antitrust remedies, demonstrated in Allen Bradley, *supra,* that led directly to the Taft-Hartley prohibition of secondary boycotts.[3]

"Our own court in *Joliet Contractors Association* v. *National Labor Relations Board,* 202 F. 2d 606 (1953), cert. den. 346 U. S. 824, 74 S. Ct. 40, 98 L. Ed. 349, considered an area boycott similar to that in Allen Bradley. It was a typical product boycott case. There Glazier's Union Local 27 had a rule that preglazed window sashes could not be installed, and the union's bylaws and agreements with the contractor provided that all sash and glass work must be done on each respective job site or building. We rejected the argument there made that the union's dispute with the contractor was only primary and that its objective was preservation of work on the job, saying, at 202 F. 2d 610:

> "'• • • the fact remains that the target was the use of preglazed sash, and any and all who handled, used or sold such sash were the intended and in many cases the actual victims of the Union's course. Moreover, we are not convinced that a Union violation of the provision under discussion is dependent upon whether its activities are primary or secondary. • • •'

"*In the case at bar the Union's target was and is prefabricated doors.* Neither here nor in Joliet Contractors was there a labor dispute between the union and any manufacturer.[4] In Joliet Contractors we found the union's refusal to install such products to be a

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3. Legislative History of the Labor Management Relations Act, 1947, pp. 1055-1056, 93 Cong. Rec. 4255.

4. As in Allen Bradley, in the case at bar the Union was not concerned with whether the boycotted doors were union made.

violation of § 8(b) (4)-(A).[5] At that time the proviso in § 8(b) (4) (B) had not been enacted." (Emphasis added.)

5. Now known as (B).

The Court's holding below with respect to the Frouge job conflicts in basic principle with the above-cited decisions of this Court and other courts of appeals (as well as with the Court's own finding of violation with respect to the three first-named jobs), in that it rejected the established doctrine that the *existence* of *a* proscribed objective is determinative of violation and adopted instead the Board's specious new concept that "right of control" in the immediate employer is conclusively determinative that the union's sole target is that employer.

The repugnance of this "control" rationale to the doctrine of the cited decisions is that it makes the incidental factor of the extent to which the immediate employer could satisfy the union's demands the determinative factor in ascertaining the union's objective. Under the statute and cited cases, it is the union's actual boycott objective that is controlling—not the legal or economic ability of any particular employer to capitulate. It is apparent that a union can have such a proscribed objective whether or not its attainment would cause the immediate employer to honor or breach his contracts with others.* Thus, when a union's target is clearly the prohibition of a prefabricated product, the thrust and effect of the boycott on the manufacturers and distributors of the product does not disappear or change because the immediate employer may not be legally obligated to use the product.

The fallacy and artificiality of the "control" theory is

* The statutory proscription is against requiring any person "to cease using . . . the products" of a manufacturer—and not "to cease using the products which the person has a legal commitment to use."

apparent from its application in the present case. Rule 17 sought to preserve work for jobsite carpenters *on all four jobs* by prohibiting prefabricated doors. It was by the enforcement of Rule 17 *on all four jobs* that the Union prevented the use of prefabricated doors. The Court and the Board unequivocally found that, as to the three first-named jobs, "the Union's target was and is prefabricated doors" (*infra*, p. 33; J. A. 3, 29). But it is clear that the Union had exactly the same proscribed target on the Frouge job as on the other three. The only way in which the Union's goal, under Rule 17, could be accomplished was to force Frouge to stop using prefabricated doors—which it did! Frouge was forced to stop using some 660 prefabricated doors which had already been purchased, varnished and prepared for installation and to ship them elsewhere (J. A. 15-16).

Thus, the Union's motive of work preservation and its boycott of prefabricated doors on all four jobs was precisely the same—only the factor of control was different. But control cannot, as a matter of law, be a determinative distinction because, with or without it, the proscribed objective of banning prefabricated doors remains. By ignoring this proscribed objective, the "control" concept does not eliminate it—i.e., Frouge's contractual freedom to capitulate to the boycott did not change the force or direction of the Union's proscribed objective of banning prefabricated doors.*

* Contractors Nason (St. Aloysius Academy), Driscoll (Coatesville Hospital), and McDonnell (North Junior High School) could have breached or canceled their specifications for Hardwood and Oxford doors, just as Frouge breached or canceled his order for Mohawk doors—but all that would have gone only to the means or intermediate method by which the existent illegal boycott against prefabricated doors was accomplished. Under this artificial "control" concept, it appears that if a building owner does his own purchasing directly or by specification, a union's boycott of prefabricated products violates Section 8(b)(4)(B). However, if the contractor is permitted by the owner to select the materials, a union boycott of prefabricated products is immune from attack under Section 8(b)(4)(B).

We respectfully submit that the Board's "control" concept adopted by the Court below would, as a matter of law, write into Section 8(b)(4)(B) a limitation precluding recognition of *existent* proscribed objectives which conflicts in basic principle with the decisions of this Court and other courts of appeals that (g. en requisite inducement or coercion) the existence of *a proscribed objective* is determinative of violation.*

2. The Court's apparent reliance on the "primary strike or primary picketing" proviso (added by the 1959 amendments) in its finding of no violation on the Frouge job would appear to conflict with the pronouncements of this Court and legislative authorities concerning the meaning and purpose of the proviso.

In conjunction with its conclusion that the Union's conduct on the Frouge job "involved only a primary dispute with him [contractor Frouge]" (*infra*, p. 31), the Court quoted Section 8(b)(4)(B), with emphasis on the "primary strike or primary picketing" proviso added by the 1959 amendments and stated:

> "We hold that Frouge was the object of a 'primary strike or primary picketing' and therefore the Union was entitled to the protection of the proviso in § 8(b)(4)(B)."

Later, in connection with its reference to its earlier decision

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* For instance, what difference did it make in *Allen Bradley* (*supra*, pp. 12, 14), *Sound Shingle* (*supra*, pp. 11-12, *General Millwork* (*supra*, pp. 12, 13), *Joliet Contractors* (*supra*, pp. 13-15), and other product boycott cases whether the particular contractors were or were not contractually free to ban the blacklisted products? Obviously none, because (as here) the objective of banning the boycotted products and stopping those in the chain of distribution from handling them was apparent.

In fact, the Court below, in commenting on the unlawfulness of the type of product boycott involved in *Allen Bradley*, expressly stated (*infra*, p. 32): "Further, Local 3 was not concerned with whether the immediate contractor had or did not have 'control of the work.'"

in *Joliet Contractors Association* v. *NLRB*, 202 F. 2d 606 (1953), the Court said (*infra*, p. 33):

> "At that time the proviso in § 8(b) (4) (B) had not been enacted."

Thus, the Court's differentiation between its finding of violation of Section 8(b) (4) (B) on the Coatesville Hospital, North Junior High School, and St. Aloysius Academy jobs and its finding of no violation on the Frouge job seems to have been based on the view that the 1959 proviso *changed* previously existing product boycott law in this respect—i.e., created a new immunity for primary work-preservation disputes.

We respectfully submit that the Court's apparent reliance on the proviso was misplaced. Authoritative legislative statements conclusively reveal that the purpose of the 1959 proviso was *to preserve*, and *not to change*, existing product boycott law. It did not create any new "primary" rights, nor did it take away any such rights—its purpose was strictly to maintain the *status quo* on picketing.

In *Rice Milling*,* this Court held that one reason why the picketing of a truck driver as he approached a struck plant was not a secondary boycott was that it did not induce "concerted" action by employees. The 1959 Landrum-Griffin Bill, as it went to conference, eliminated reference to "concerted" refusals and proscribed, rather, "individual" refusals. When the bill was in conference, fear was expressed by labor advocates that this change would reverse *Rice Milling* and make picketing of individuals at a primary-strike situs unlawful. To preserve *existing* law and to protect against *any change* in this respect, the pro-

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* *Labor Board* v. *Rice Milling Co.*, 341 U. S. 665 (1951).

viso was added in conference. This was explained in the Conference Report as follows* (I Leg. Hist. 942):

> ". . . (4) the amendment adopted by the committee of conference contains a provision 'that nothing contained in clause (B) of this paragraph (4) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing.' The purpose of this provision is to make it clear that the changes in section 8(b) (4) *do not overrule or qualify the present rules of law* permitting picketing at the site of a primary labor dispute. This provision does not eliminate, restrict, or modify the limitations on picketing at the *site of a primary labor dispute that are in existing law.* . . ." (Emphasis added.)

The views of the Court below with respect to the "primary strike or primary picketing" proviso appear to be in conflict with the views of this Court in *Electrical Work-*

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* Adherence to existing law as the reason for the proviso was repeatedly stressed:

Senate Report on the Compromise Bill (II Leg. Hist. 1383):

> "The proposal follows the language of the House bill. The changes are the addition of provisos clarifying the following points:
>
> "1. The secondary boycott amendments are not to be construed *to prohibit primary strikes and picketing permitted by existing law.*" (Emphasis added.)

Senator Kennedy, commenting on Conference Bill (II Leg. Hist. 1431-1432):

> "The chief effect of the conference agreement, therefore, will be to plug loopholes in the secondary boycott provisions of the National Labor Relations Act. There has never been any dispute about the desirability of plugging these artificial loopholes. The secondary boycott provisions of the House bill would have curtailed legitimate union activities. Accordingly, the Senate conferees insisted that the report secure the following rights:
>
> "(a) The right to engage in primary strikes and primary picketing even though the employees of other employers refused to cross the picket line.
>
> "The fact of the matter is that there is some question under the Landrum-Griffin bill whether employees of another employer could have properly refused not to cross a picket line in a primary strike. That has been clarified in the conference report."

ers v. *Labor Board*, 366 U. S. 667, 681 (1961), wherein Mr. Justice Frankfurter, speaking for the Court, stated:

> "The 1959 Amendments to the National Labor Relations Act, which removed the word 'concerted' from the boycott provisions, included a proviso that 'nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing.' 29 U. S. C. (Supp. I, 1959) § 158(b) (4) (B). The proviso was directed against the fear that the removal of 'concerted' from the statute might be interpreted so that 'the picketing at the factory violates section 8(b) (4) (A) because the pickets induce the truck drivers employed by the trucker not to perform their usual services where an object is to compel the trucking firm not to do business with the . . . manufacturer during the strike.' Analysis of the bill prepared by Senator Kennedy and Representative Thompson, 105 Cong. Rec. 16589."

Thus, the only purpose and effect of the proviso was to preserve existing law as to picketing at struck plants. It created no new "primary" rights and took away none. Primary work-preservation disputes had not been, and did not become a defense when there was an objective of boycotting the products of other employers. The proviso had nothing whatever to do with the "control" criterion which the Board and the Court below only recently have applied; rather, the then existing law, which did not include the "control" concept continued in full force and effect.

3. The case involves an important question of law under the secondary boycott provisions of the Act, which is of major concern to a broad segment of business and industry and to the consuming public.

Product boycotts, such as the one here involved, was one of the most commonly cited reasons for the enactment of Section 8(b)(4)(B) in 1947, as amended in 1959 (J. A. 128; *infra*, p. 32). Judicial acceptance of the Board's

"control" rationale would open a new wide loophole of immunity for product boycotts such as have been consistently held unlawful since 1947. The trade unions could engage in the boycott of prefabricated products with impunity by the simple expedient of requiring contractors to work under "open" product specifications. The Electrical Workers Union involved in *Allen Bradley** could resume its boycott of prefabricated electrical fixtures in New York whenever contractors had "control" of the purchases. The Glaziers Union involved in *Joliet Contractors*** could resume its boycott of unspecified preglazed windows in the Chicago and Joliet metropolitan areas. The Carpenters Union involved in *General Millwork**** could resume its boycott of prehung doors in Cincinnati.

The situation is the more serious because of the retrogressive effect it would have on the technological progress that has occurred in recent years in the construction and other industries. Prefabrication has resulted in better products of less cost and has greatly benefited the consuming public.

Petitioner NWMA represents almost all major manufacturers of doors, windows and millwork in the woodwork industry. A large part of these products are prefabricated building components, which would be barred by the enforcement of Rule 17 and like rules in construction areas throughout the United States.

We respectfully submit that the broad and adverse impact of the Board's and Court's decisions below is indicated also by the fact that many industries filed briefs, as *amici curiae*, in the Court below, urging reversal of the Board's

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* *Allen Bradley Co.* v. *Union*, 325 U. S. 797 (1945).

** *Joliet Contractors Association* v. *NLRB*, 202 F. 2d 606 (C. A. 7, 1953).

*** *NLRB* v. *Local 11, etc.*, 242 F. 2d 932 (C. A. 6, 1957).

decision.* The *amici curiae* gave many illustrations of the prefabricated products** which would be subject to boycott under the rulings below. Petitioners and these many other industries are much concerned about the decisions below because of the conviction that if this new "control" doctrine is permitted to stand, unions throughout the country will be enabled to draw boycott walls around their respective communities, banning technologically improved products and advanced construction methods, and thereby cause a state of stagnation in the home-building and other industries affected.

We submit also that the questions presented are of importance in the administration of the Act. An illustration of this is that there are now pending in the Eighth Circuit Court of Appeals two cases involving union boycotts of prefabricated factory-assembled boilers in the Minneapolis-St.

*National Lumber Manufacturers Association (representing the lumber industry, which is the fourth largest employer of manufacturing labor in the United States);
American Hardboard Association (representing an industry employing 8,900 workers and whose products are one-third prefabricated);
Architectural Woodwork Institute (representing 580 manufacturers and distributors of architectural woodwork, a large part of which is prefabricated);
Hardwood Plywood Manufacturers Association (representing an industry employing 35,000 workers and making products almost one-half of which are prefabricated);
National Association of Home Builders (representing the home-building industry of 44,000 members);
American Plywood Association (representing the plywood industry, a large part of whose products are prefabricated);
American Boiler Manufacturers Association (representing the 60 major manufacturers of boilers, a large part of whose products are prefabricated and preassembled at the factory).

** Among them are: (1) prefabricated doors; (2) roof trusses; (3) factory-cut and packaged structural lumber; (4) laminated engineered beams and arches; (5) wall and partition panels; (6) windows and window wall units; (7) cabinetwork; (8) roof panels; (9) box beams; (10) prefabricated sheet metal products; (11) factory-assembled boilers; (12) prefabricated air-conditioning and heating units; (13) oil and refining equipment.

Paul area, which cases involve the same questions as are presented herein.*

We understand that the Board is seeking certiorari of that part of the decision below which is adverse to the Board's position. We respectfully submit that the granting of the Board's petition for certiorari would be an additional compelling reason for granting the petition herein because it is most desirable that the closely related and equally important questions presented herein should also be resolved by this Court.

CONCLUSION.

For the foregoing reasons, it is respectfully requested that this petition for a writ of certiorari be granted.

Respectfully submitted,

CHARLES B. MAHIN,
Counsel for Petitioners.

April 20, 1966.

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* *American Boiler Manufacturers Association* v. *NLRB*, Cause No. 18106, and *American Boiler Manufacturers Association* v. *NLRB*, Cause No. 18107.

APPENDIX A.

National Labor Relations Act, as Amended (61 Stat. 136, 73 Stat. 519, 29 U. S. C. § 151, et seq.).

"Sec. 8. • • •

"(b) It shall be an unfair labor practice for a labor organization or its agents—

• • • • • •

"(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

• • • • • •

"(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing."

APPENDIX B.

National Woodwork Manufacturers Association v. *NLRB*, 354 F. 2d 594 (C. A. 7, November 17, 1965):

Before HASTINGS, *Chief Judge*, and SCHNACKENBERG and KNOCH, *Circuit Judges*.

SCHNACKENBERG, *Circuit Judge*.

Petitioner, National Woodwork Manufacturers Association, on behalf of its members, Hardwood Products Corporation, a Wisconsin corporation, and Mohawk Flush Doors, Inc., an Indiana corporation, herein called "NWMA", "Hardwood", and "Mohawk", respectively, asks us in No. 14904 to review and modify an order of the National Labor Relations Board, herein called the "Board", issued on November 12, 1964, dismissing, in part, a complaint against Metropolitan District Council of Philadelphia and Vicinity of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO, et al., herein called the "Council" or the "Union".

In No. 14988, NWMA and Charles B. Mahin, an individual, made charges upon which the Board issued a complaint on August 27, 1963, and its amended complaint on October 4, 1963, alleging that respondent unions had engaged and were engaging in unfair labor practices in violation of section 8(b) (4) (A), section 8(b) (4) (B), and section 8(e) of the Labor Management Relations Act of 1947, as amended, herein called the "Act", 29 U. S. C. A. § 158. In No. 14988, the Board seeks enforcement of its order entered against the Council and its affiliated local unions.

In No. 15064, the Council, Robert L. Gray and Charles

L. Boyer, by their petition, seek an order setting aside the order of the Board to the extent that it finds against them and imposes sanctions on them.

Following a hearing before an examiner and the filing of his decision, the Board issued the aforesaid order of November 12, 1964, which dismissed all charges of violations except those with respect to the Union's conduct on three construction jobs described as (1) the Coatesville Hospital job, at which L. F. Driscoll Company was general contractor; (2) the North Junior High School job, at which John J. McDonnell, Inc., was general contractor; and (3) the St. Aloysius Academy job, at which Nason & Cullen, Inc., was general contractor; as to each of which the Board found violations of section 8(b) (4) (B) but granted what NWMA considers only partial and inadequate relief.

Twenty-seven local carpenter unions in Philadelphia and in four other counties in Pennsylvania are affiliated with the Metropolitan District Council of Philadelphia and Vicinity. These locals are "serviced" by 11 business agents who work directly under Gray, the Council's secretary-treasurer and business manager. These business agents police the jobs and see that contracts are adhered to.

The Council engages in collective bargaining with individual employers and with the General Building Contractors' Association, Inc. (GBCA), which bargains on behalf of its employer members who build schools, hospitals, factories, and other structures in the Philadelphia area. The contracts in effect during the relevant period contain a provision similar to rule 17 of the Union's bylaws, which reads as follows:

> Rule 17. No employee shall work on any job on which cabinet work, fixtures, millwork, sash, doors, trim or other detailed millwork is used unless the same is Union-made and bears the Union Label of the United

Brotherhood of Carpenters and Joiners of America.[1] *No member of this District Council will handle material coming from a mill where cutting out and fitting has been done for butts, locks, letter plates, or hardware of any description, nor any doors or transoms which have been fitted prior to being furnished on job, including base, chair, rail, picture moulding, which has been previously fitted. This section to exempt partition work furnished in sections.* (Emphasis added.)

It is petitioner's contention in No. 14904 that the Union engaged in an unlawful product boycott of prefabricated doors in the Philadelphia area and enforced an illegal hot-cargo contract prohibiting the use of such prefabricated doors[2] throughout said area.

Prefabricated doors are doors which are machined, processed and finished in various ways at the plants where they are manufactured. There was testimony that the use of prefabricated doors saves time and money.

Petitioner cites, as a matter of common knowledge, that the use of prefabricated doors has been greatly increasing in the construction industry, which extends to numerous other parts of building, such as windows, factory-built trusses, wall and partition assemblies, prefinished paneling,

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1. The first sentence in Rule 17 concededly violates section 8(e) but no issue is presented here concerning that aspect of the case.

2. (1) Prefitted doors which have been cut to exact size and beveled at the factory so that they will fit into frame openings on the job without further machining.

(2) Precut doors which have been machined at the factory to receive hardware (locks, knobs, hinges, etc.), louvers, glass openings, and the like.

(3) Prefinished doors which have been preservative-treated, sealed, varnished, painted, or otherwise finished at the factory for ultimate use without further finishing. (Such doors must be completely machined before the final finish is affixed at the factory.)

(4) Armored doors which are completely machined at the factory and have plastic or other wear-resistant materials laminated to surfaces and edges.

(5) Prehung doors which are completely machined and assembled in door-frame units at the factory.

prefabricated kitchens and bathrooms, and on up to the point of prefabricated houses and other buildings.

Prior to the present proceedings a letter was written in February, 1963, by Business Manager Gray of the Council to President Hutchinson of the United Brotherhood of Carpenters, stating that there was a serious problem of precut and prefitted doors coming into the Philadelphia area. Then followed a union drive to bar all prefabricated doors, which was implemented by the alleged boycotts and work stoppages that led to the NWMA charges against the Union and these proceedings.

Typical of the operation of the Union drive in this respect was the Coatesville Hospital job in May 1963. Driscoll, the contractor, purchased through a Pennsylvania millwork distributor, prefabricated architectural doors made by Hardwood for this job. In accordance with the architect's common practice, the specifications called for precut, prefitted and prefinished doors. On May 23, the day after the doors were delivered to the job, Union agent Boyer called from the job and told vice-president Brown of Driscoll that the prefinished doors could not be hung, because it was "in violation of an agreement". When Brown asked "where do we go from here?", Boyer said that he did not know and that if the doors were hung anyhow, the job would be "struck". Boyer admitted that his word was not final and that Brown could take it up with Gray. Brown then called Gray and stated what had occurred, but Gray said that "no carpenters from now on will hang pre-finished or pre-fit doors." Brown asked what could be done, because the hospital was hoping to get into the building, and Gray said that was not his problem. Thereupon Driscoll's secretary telephoned Gray and asked for an explanation and was told that Driscoll was in violation of rule 17 because the doors had been factory precut, and that the carpenters were not allowed to hang them. From

May 23, when the Union carpenters discovered the doors on the job, until May 27, they refused to hang them. They were then hung after the contractor agreed to pay the carpenters for work which they did not perform.

Such a solution was not reached in the North Junior High School, St. Aloysius Academy or Frouge Corporation jobs, the first two of which are factually not different from the Coatesville Hospital job.

Frouge Corporation was the general contractor on a housing project in Philadelphia, for which it ordered factory-machined Mohawk doors. Neither job specifications nor Frouge's contract required that the doors be precut, prefitted, or premachined. When the second shipment thereof arrived, Union agents did not allow their men to work on them. They cited rule 17 which was then shown to and read by President Frouge and Project Manager Green. Frouge had Green order 665 Mohawk doors, which, when delivered, did not bear a union label. Union carpenters did the cutting on the replacement doors which were then installed on the job.

[1] The Board held that the Union violated § 8(b) (4) (i) (ii) (B), by reason of its boycott of prefabricated doors on the Coatesville, North Junior High and St. Aloysius jobs, but as to Frouge, it held otherwise, giving as its reason, that, while in the first three jobs the specifications called for prefabricated doors and hence the Union target was the doors and persons making and distributing them, in Frouge the Union boycotted prefabricated doors which had been purchased by the contractor—but which were *not required* by job specifications. This conclusion seems to indicate that the Board held that the Union's target in Frouge was not the prefabricated doors and their manufacturer but rather contractor Frouge and that the situation involved only a primary dispute with him. We agree.

Section 8(b) (4) (i) (ii) (B) reads as follows:

> (b) It shall be an unfair labor practice for a labor organization or its agents—
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> • • • • •
>
> (4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—
>
> • • • • •
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, • • •. *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, *any primary strike or primary picketing* [emphasis supplied] • • •.

We hold that Frouge was the object of a "primary strike or primary picketing" and therefore the Union was entitled to the protection of the proviso in § 8(b) (4) (B).

We now consider the objections of the Union to the Board's finding of violations of § 8(b) (4) (B) as to the first three contractors above-named.

The language of the statute and its legislative history clearly indicate that § 8(b) (4) (B) applies to the product boycott carried on by the Union in this case under its rule 17. In *Allen Bradley Co.* v. *Local Union No. 3,* etc., 325 U. S. 797, 65 S. Ct. 1533, 89 L. Ed. 1939 (1945), it appeared that Local 3 of the Electrical Workers Union and the Electrical Contractors of New York City had agreed on work rule restrictions, under which Local 3 refused to handle

or install electrical fixtures and equipment made or assembled outside the New York City area. It was agreed that, in lieu of absolute prohibition, the union would dismantle and rebuild the "foreign" equipment or be paid the equivalent thereof. Local 3 had no active labor dispute with the "foreign" manufacturers, nor did it have any interest in the working conditions at such factories. It was not concerned with whether the "foreign" fixtures were union made—in fact, it barred fixtures made by its sister local union in New Jersey. Further, Local 3 was not concerned with whether the immediate contractor had or did not have "control of the work". Clearly, the union's ultimate objective was to preserve work for its members. The intermediate objective, as the means to its ultimate goal, was the boycott of foreign products. It was the inadequacy of antitrust remedies, demonstrated in *Allen Bradley, supra,* that let directly to the Taft-Hartley prohibition of secondary boycotts.[3]

Our own court in *Joliet Contractors Association* v. *National Labor Relations Board,* 202 F. 2d 606 (1963), cert. den. 346 U. S. 824, 74 S. Ct. 40, 98 L. Ed. 349, considered an area boycott similar to that in Allen Bradley. It was a typical product boycott case. There Glazier's Union Local 27 had a rule that preglazed window sashes could not be installed, and the union's bylaws and agreements with the contractor provided that all sash and glass work must be done on each respective job site or building. We rejected the argument there made that the union's dispute with the contractor was only primary and that its objective was preservation of work on the job, saying, at 202 F. 2d 610:

> "* * * the fact remains that the target was the use of preglazed sash, and any and all who handled,

3. Legislative History of the Labor Management Relations Act, 1947, pp. 1055-1056, 93 Cong. Rec. 4255.

used or sold such sash were the intended and in many cases the actual victims of the Union's course. Moreover, we are not convinced that a Union violation of the provision under discussion is dependent upon whether its activities are primary or secondary. * * *"

[2] In the case at bar the Union's target was and is prefabricated doors. Neither here nor in Joliet Contractors was there a labor dispute between the union and any manufacturer.[4] In Joliet Contractors we found the union's refusal to install such products to be a violation of § 8(b) (4) (A).[5] At that time the proviso in § 8(b) (4) (B) had not been enacted.

We find nothing to the contrary in *Local 761, International Union of Electrical, Radio & Machine Workers, AFL-CIO* v. *National Labor Relations Board, et al.*, 366 U. S. 667, 81 S. Ct. 1285, 6 L. Ed. 2d 592 (1961), relied on in the brief of the Union.

Our views find support in *National Labor Relations Board* v. *Local 11, United Brotherhood of Carpenters, etc.*, 6 Cir., 242 F. 2d 932 (1957) which involved § 8(b) (4) (A)[6] of the Act. The Board there contended that the carpenters' union induced a concerted refusal by the employees of the subcontractors to handle prehung doors in a building project in Ohio, which doors had been manufactured in Indiana and Michigan and were sold as component parts of prefabricated home units to the general contractor in the Cleveland, Ohio area.

Judge Stewart (now Justice Stewart) said at 934:

"Substantially adopting the Trial Examiner's Intermediate Report, a majority of the Board found the respondents had induced and encouraged employees of the

4. As in Allen Bradley, in the case at bar the Union was not concerned with whether the boycotted doors were union made.

5. Now known as (B).

6. Now known as (B).

subcontractors to engage in a concerted refusal to handle the prehung doors, and that objectives of the respondents' conduct were to force or require the subcontractors to cease using prehung doors, to force or require Erie Building Company to cease using and purchasing prehung doors, and to force or *require Scholz Homes, Inc., to cease doing business with the maufacturers of the doors.* (Italics supplied.)

* * * * *

"The fact that there was not an active labor dispute between the respondents and the producers of the doors would not serve to immunize the respondents from the terms of § 8(b) (4) (A) of the Act, which neither literally nor implicitly requires the existence of such a dispute as a condition of its operation. *N. R. L. B.* [*sic.*] v. *Washington-Oregon Shingle Weavers' Dist. Council,* 9 Cir., 1954, 211 F. 2d 149, 152-153.

* * * * *

"This brings us to the respondents' primary defense. They say that even if they encouraged and induced a concerted work stoppage by employees with respect to the doors, this did not constitute an unfair labor practice within the meaning of § 8(b) (4) (A) because the immediate employers (the subcontractors) had acquiesced in advance in the employees' action by virtue of a collective bargaining agreement containing a 'hot cargo' clause, and also by reason of the fact that the subcontractors themselves [*sic.*] belonged to the union, and as union members were obligated not to use the prehung doors. Although the Board found upon conflicting evidence that no collective bargaining agreement containing a 'hot cargo' clause was then in effect, it is conceded that the subcontractors were members of the union and that they acquiesced in the conduct of their employees in not handling or working on the doors in question."

By an amendment enacted in 1959 subsection (e) was added to § 8 of the Act, 29 U. S. C. A. § 158, providing, in part:

(e) It shall be an unfair labor practice for any

labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided,* That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: * * *.

The distinction between job site work and factory-made products is recognized in the foregoing construction proviso of § 8(e) itself. The legislative history shows that it was explained by Senator Kennedy that the "proviso does not cover boycotts of goods manufactured in an industrial plant for installation at the jobsite."[7]

We hold that § 8(e) unaffected by the proviso is controlling in this case.

For all of these reasons, that part of the Board's order entered November 12, 1964 dismissing, in part, the complaint against the Council is set aside and this cause is remanded to the Board with instructions to enter an order finding that the Council violated § 8(b) (4) (i) (ii) (A) and § 8(e) of the Act, as set forth herein, as well as § 8(b) (4) (i) (ii) (B) to the extent found by the Board, which action we affirm.

The Board is directed to restrain any further such proscribed violations of the Act by the Council in the Philadelphia area.

In part affirmed and in part set aside and remanded with directions.

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7. J. A. 135; II Leg. Hist., p. 1448.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit.
Chicago, Illinois 60604.

Monday, January 24, 1966.

Before:

Hon. John S. Hastings, Chief Judge.
Hon. Elmer J. Schnackenberg, Circuit Judge.
Hon. Win G. Knoch, Circuit Judge.

NATIONAL WOODWORK MANUFACTURERS ASSOCIATION, *et al.*, *Petitioners*,
No. 14904 *vs.*
NATIONAL LABOR RELATIONS BOARD, *Respondent*;
} Petition for review of an order of the National Labor Relations Board.

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,
No. 14988 *vs.*
METROPOLITAN DISTRICT COUNCIL OF PHILADELPHIA, ETC., *et al.*, *Respondents*;
} Petition for enforcement of an order of the National Labor Relations Board.

METROPOLITAN DISTRICT COUNCIL OF PHILADELPHIA AND VICINITY, ETC., *et al.*, *Petitioners*,
No. 15064 *vs.*
NATIONAL LABOR RELATIONS BOARD, *Respondent*.
} Petition for review of an order of the National Labor Relations Board.

IT IS ORDERED by the Court that the petition for rehearing filed by National Woodwork Manufacturers Association, *et al.*, and the petition for rehearing filed by the National Labor Relations Board be, and the same are hereby DENIED.

UNITED STATES COURT OF APPEALS,

For the Seventh Circuit.

NATIONAL WOODWORK MANUFACTURERS ASSOCIATION, a non-profit corporation for itself and on behalf of its members,

and

HARDWOOD PRODUCTS CORPORATION, a Wisconsin corporation, and MOHAWK FLUSH DOORS, INC., an Indiana corporation,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

No. 14,904

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

METROPOLITAN DISTRICT COUNCIL OF PHILADELPHIA AND VICINITY OF THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO, and its affiliated Local Unions, and Robert H. Gray and Charles L. Boyer,

Respondents.

No. 14,988

METROPOLITAN DISTRICT COUNCIL OF PHILADELPHIA AND VICINITY, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO, and Robert H. Gray and Charles L. Boyer,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

No. 15,064

DECREE.[*]

Before: HASTINGS, *Chief Judge*, and SCHNACKENBERG and KNOCH, *Circuit Judges*.

The above consolidated cases came on to be heard upon petitions to review and a petition to enforce an Order of the National Labor Relations Board, dated November 12, 1964. The Court heard argument of respective counsel on October 18, 1965, and has considered the briefs and transcript of record filed in these proceedings. On November 17, 1965, the Court, being fully advised in the premises, handed down its opinion granting enforcement of the Board's said order respecting certain violations of 8 (b) (4) (i) (ii) (B) and remanding to the Board with instructions to enter an order finding that Metropolitan District Council of Philadelphia and Vicinity of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO and its affiliated Local Unions, and Robert H. Gray and Charles L. Boyer (herein referred to as the Council) violated 8(b)(4)(i)(ii)(A) and 8(e) of the Act as set forth in the opinion, and restraining any further such proscribed violations of the Act by the Council in the Philadelphia area. In conformity with the Board's original order aforesaid, which is the only order presently before the Court, and pending the Board's entry of its new order embodying the additional violations found by this Court, it is hereby

[*] This Decree is printed because the Clerk of the Court below certified it as part of the record. This Decree, by its terms, relates only to the Order of the Board originally entered and does not take into account, and is inconsistent with, that part of the Court's judgment finding that the Council's Rule 17 violated Section 8(e) of the Act. Counsel for the Board advised the Court below that the Board in due course would enter an order, in accordance with the judgment of the Court after which the Board would petition the Court to enforce the revised Board order by an appropriate decree.

ORDERED, ADJUDGED AND DECREED that:

1. Respondents, Metropolitan District Council of Philadelphia and Vicinity of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO, and its Affiliated Local Unions, their officers, representatives, agents, successors, and assigns, shall:

A. Cease and desist from entering into and maintaining any agreement containing the "Union Label" sentence of Working Rule 17, or any like or related provision.

B. Take the following affirmative action which has been found necessary to effectuate the policies of the National Labor Relations Act (hereinafter called the Act).

(1) Post in conspicuous places in Respondents' business offices, meeting halls, and all places where notices to members are customarily posted, copies of the notice attached hereto and marked "Appendix A." Copies of said notice, to be furnished by the Regional Director for the Fourth Region (Philadelphia, Pennsylvania) shall, after being duly signed by Respondents' authorized representatives be posted by Respondents immediately upon receipt thereof and be maintained by them for 60 consecutive days. Reasonable steps shall be taken by Respondents to insure that such notices are not altered, defaced, or covered by any other material.

(2) Furnish to the said Regional Director signed copies of the aforementioned notice for posting by L. F. Driscoll Company, Fronge Corporation, and by any employers in the Philadelphia, Pennsylvania, area who are members of the General Building Contractors Association which has a collective-bargaining agreement with Respondents, if said Employers agree, in places where notices to employees are

customarily posted. Copies of said notice, to be furnished by the Regional Director shall, after being signed by Respondents as indicated, be forthwith returned to the Regional Director for disposition by him.

(3) Notify the said Regional Director in writing, within 10 days from the date of this Decree, what steps the Respondents have taken to comply herewith.

2. Respondent Metropolitan District Council of Philadephia and Vicinity of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO, its officers, representatives, successors, assigns and agents, including Robert H. Gray and Charles L. Boyer, shall:

A. Cease and desist from inducing or encouraging any individual employed by Nason and Cullen, Inc., John J. McDonnell, Inc., L. F. Driscoll Company, or by any other person engaged in commerce or in an industry affecting commerce, to engage in a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services, and cease and desist from threatening, coercing, or restraining any of the aforenamed employers or any other person engaged in commerce or in an industry affecting commerce, where, in either case, an object thereof it to force or require any of the aforementioned employers or persons to cease doing business with mill suppliers, including T. W. Hammond & Bros., John A. Yohn Co., and Boyertown Planing Mill Co., or to force or require said mill suppliers to cease doing business with door manufacturers, including Oxford Plastics Co., and Hardwood Products Corporation.

B. Take the following affirmative action which has been found necessary to effectuate the policies of the Act:

(1) Post in conspicuous places in Respondents' business offices, meeting halls, and all places where notices to members are customarily posted, copies of the notice attached hereto and marked "Appendix B." Copies of said notice to be furnished by the aforesaid Regional Director, shall, after being duly signed by the representatives of Respondents and by the individual Respondents herein, be posted by said Respondents, as aforesaid, immediately upon receipt thereof and maintained by them for a period of 60 consecutive days thereafter. Reasonable steps shall be taken by the Respondents to insure that said notices are not altered, defaced, or covered by any other material.

(2) Furnish to the said Regional Director signed copies of the aforementioned notice for posting by each of the employers and persons mentioned in paragraph 1 B, (2) *supra*, who are willing, in places where notices to employees are customarily posted. Copies of said notice, to be furnished by the Regional Director, shall, after being signed by Respondents, as indicated, be forthwith returned to the Regional Director for disposition by him.

(3) Notify said Regional Director in writing, within 10 days from the date of this Decree, what steps Respondents have taken to comply herewith.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that this cause be, and hereby is, remanded to the Board with instructions to enter an order finding that the Council violated Section 8(b)(4)(i)(ii)(A) and Section 8(e) of the Act, as set forth in the opinion of this Court. Upon pre-

sentation, an appropriate decree will be entered as to the violations of Section 8(b)(4)(i)(ii)(A) and 8(e).

/s/ ELMER J. SCHNACKENBERG,
Judge, United States Court of Appeals for the Seventh Circuit.

/s/ JOHN S. HASTINGS,
Judge, United States Court of Appeals for the Seventh Circuit.

/s/ WM G. KNOCH,
Judge, United States Court of Appeals for the Seventh Circuit.

A True Copy:

Teste:

KENNETH J. CARRICK,
Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX A.

NOTICE

PURSUANT TO

A Decree of the United States Court of Appeals Enforcing an order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that:

WE WILL NOT enter into or maintain any agreement containing the "Union Label" sentence of Working Rule 17, or any like or related provision.

METROPOLITAN DISTRICT COUNCIL OF PHILADELPHIA AND VICINITY OF THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO.
(Labor Organization).

Dated ..... By .....
(Representative) (Title)

THE AFFILIATED LOCAL UNIONS.
(Labor Organization).

Dated ..... By .....
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Regional Office, 1700 Bankers Securities Building, Walnut and Juniper Streets, Philadelphia, Pennsylvania 19107 (Tel. No. 735-2612), if they have any question concerning this notice or compliance with its provisions.

APPENDIX B.

NOTICE

PURSUANT TO

A Decree of the United States Court of Appeals Enforcing an order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that:

WE WILL NOT induce or encourage any individual employed by Nason and Cullen, Inc., John J. McDonnell, Inc., L. F. Driscoll Company, or by any other person engaged in commerce or in an industry affecting commerce, to engage in a strike or a refusal in the course of his employment to handle, work on, or perform any services on, precut or prefit, millwork, including precut or prefit doors, and We Will Not threaten, coerce or restrain any of the aforenamed employers or any other person engaged in commerce or in an industry affecting commerce, where in either case, an object is to force or require any of the aforementioned employers or persons to cease doing business with mill suppliers, including T. W. Hammond & Bro., John A. Yohn, Co., and Boyertown Planing Mill Co., or to force or require said mill suppliers to cease doing business with door manufacturers, including Oxford Plastics Co. and Hardwood Products Corporation.

METROPOLITAN DISTRICT COUNCIL OF PHILADELPHIA AND VICINITY OF THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO.

(Labor Organization).

Dated ..... By .....

(Representative) (Title)

Dated ..... By .....

Robert H. Gray,

Secretary-treasurer.

Dated ..... By .....

Charles L. Boyer,

Representative.

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Regional Office, 1700 Bankers Securities Building, Walnut and Juniper Streets, Philadelphia, Pennsylvania 19107 (Tel. No. 735-2612), if they have any question concerning this notice or compliance with its provisions.

APPENDIX C.

NLRB v. *Local 11, United Brotherhood of Carpenters, etc.* (*General Millwork* case), 242 F. 2d 932 (C. A. 6, 1957):

Before SIMONS, *Chief Judge*, and MCALLISTER and STEWART, *Circuit Judges*.

STEWART, *Circuit Judge*.

The National Labor Relations Board seeks enforcement of its order holding that respondents were guilty of an unfair labor practice in participating in a secondary boycott prohibited by the National Labor Relations Act, as amended by the Labor Management Relations Act of 1947, 29 U. S. C. A. § 141 et seq.

Section 8(b) (4) (A) of the Act makes it an unfair labor practice for a labor organization or its agents:

> "to engage in, or to induce or encourage the employees of any employer to engage in, a strike, or a concerted refusal in the course of their employment to use * * * or otherwise handle or work on any goods, * * * [or] materials, * * * where an object thereof is: (A) forcing or requiring * * * any employer or other person to cease using * * * the products of any other * * * manufacturer, or to cease doing business with any other person * * *." 29 U. S. C. A. § 158(b) (4) (A).

The Board contends that respondents induced a concerted refusal on the part of employees of subcontractors to use or handle, in the course of their employment, certain "pre-hung" doors in houses in a building project in Ohio, with an object prohibited by the statute. The doors had been manufactured in Indiana and Michigan by corporations located in those states, and had been sold to Scholz Homes, Inc., in Toledo, Ohio. Scholz had resold the doors

as component parts of prefabricated home units to Erie Building Company, a general contractor in the Cleveland, Ohio, area. Erie was in the process of erecting the prefabricated houses at the time of the incidents in issue, and had engaged two subcontractors to perform work which included the installation of the doors.

Substantially adopting the Trial Examiner's Intermediate Report, a majority of the Board found the respondents had induced and encouraged employees of the subcontractors to engage in a concerted refusal to handle the prehung doors, and that objectives of the respondents' conduct were to force or require the subcontractors to cease using prehung doors, to force or require Erie Building Company to cease using and purchasing prehung doors, and to force or require Scholz Homes, Inc., to cease doing business with the manufacturers of the doors. 113 N. L. R. B. 1084, 1086 (1955).

[1] The respondents contend at the outset that the Board improperly asserted jurisdiction in this case. There is no merit in this position. The manufacturers of the doors against which the respondents' activity was directed each shipped more than $100,000 of goods in interstate commerce annually. The interference complained of had more than a *de minimis* effect. *N. L. R. B.* v. *Denver Building & Const. Trades Council*, 1951, 341 U. S. 675, 683-685, 71 S. Ct. 943, 95 L. Ed. 1284. Moreover, the assumption of jurisdiction was consistent with the Board's previously formulated standards and was in no way discriminatory. Jamestown Builders Exchange, 93 N. L. R. B. 386, 387 (1951).

On the merits the respondents deny that they were guilty of an unfair labor practice prohibited by the Act, for several reasons. They point out that the evidence does not show that there was any labor dispute between them and the primary employers, the manufacturers of the doors.

They also contend there was no substantial evidence of their inducement or encouragement of the *employees* of the subcontractors to engage in a concerted refusal to work, but only of inducement of the employers themselves to cease using the doors in question. It is their further contention that, even if there was inducement and encouragement of employees, there was no proof that more than one employee of any single employer was directly contacted. Finally, they argue that there was no "concerted refusal" by the employees "in the course of their employment" to use or handle the doors, for the reason that the immediate employers, the subcontractors, had agreed in advance to their employees' actions and completely acquiesced in them. All but the last of these contentions can be disposed of briefly.

[2] The fact that there was not an active labor dispute between the respondents and the producers of the doors would not serve to immunize the respondents from the terms of § 8(b) (4) (A) of the Act, which neither literally nor implicitly requires the existence of such a dispute as a condition of its operation. *N. L. R. B.* v. *Washington-Oregon Shingle Weavers' Dist. Council*, 9 Cir., 1954, 211 F. 2d 149, 152-153.

[3, 4] Without question the respondents are correct in their assertion that there is nothing in § 8(b) (4) (A) of the Act which makes it an unfair labor practice for a union to appeal directly to an *employer* to induce him to cease doing business with another employer. *Rabouin* v. *N. L. R. B.*, 2 Cir., 1952, 195 F. 2d 906, 912; see *Schatte* v. *International Alliance*, 9 Cir., 1950, 182 F. 2d 158, 165. In the present case, however, the Board found that the respondents had induced and encouraged *employees* not to handle or work on the doors in question and an examination of the record discloses that the findings of the Board that

respondents had engaged in such conduct are supported by substantial evidence.

[5] The fact that only a single employee of each subcontractor was contacted in the first instance would not of itself prevent the inducement from violating § 8(b) (4) (A) of the statute. *Amalgamated Meat Cutters* v. *N. L. R. B.*, 1956, 99 U. S. App. D. C. 24, 237 F. 2d 20, 23-24. As the Board pointed out, the single employees who were directly contacted by the respondents were union stewards, who could reasonably have been expected to transmit union instructions to their fellow employees.

This brings us to the respondents' primary defense. They say that even if they encouraged and induced a concerted work stoppage by employees with respect to the doors, this did not constitute an unfair labor practice within the meaning of § 8(b) (4) (A) because the immediate employers (the subcontractors) had acquiesced in advance in the employees' action by virtue of a collective bargaining agreement containing a "hot cargo" clause, and also by reason of the fact that the subcontractors themselves belonged to the union, and as union members were obligated not to use the prehung doors. Although the Board found upon conflicting evidence that no collective bargaining agreement containing a "hot cargo" clause was then in effect, it is conceded that the subcontractors were members of the union and that they acquiesced in the conduct of their employees in not handling or working on the doors in question.

The respondents' position is that if an employer has agreed in advance that a certain product need not be used by his employees, and subsequently honors his agreement by acquiescing in the employees' unwillingness to use or work on the product there can be no "concerted refusal" by the employees "in the course of their employment" to

use or work on the product in question. There can be no "refusal," the argument runs, where there is no insubordination. Similarly, their conduct in not using the product cannot be "in the course of their employment," it is argued, because the employer has agreed in advance that their employment would not include working on that product. Finally, the respondents say, an employer cannot be "forced or required" to cease handling goods which he has already agreed not to handle. These semantic contentions are buttressed by the argument that the primary purpose of § 8(b) (4) (A) of the Act is to protect neutral employers from strikes resulting from their desire to use goods produced by another employer engaged in a labor dispute, and that an employer who has agreed in advance not to use such goods needs no such protection.

These arguments are not without persuasive force, and the view they represent was the one originally adopted by a majority of the Board. Rabouin, d.b.a. Conway's Express, 87 N. L. R. B. 972, affirmed sub nom. *Rabouin* v. *N. L. R. B.*, 2 Cir., 1952, 195 F. 2d 906; Pittsburgh Plate Glass, 105 N. L. R. B. 740, 743-45 (1953). The Board has altered its view however, and now holds that regardless of acquiescence by the immediate employer any inducement of his employees for the purposes proscribed by § 8(b) (4) (A) is an unfair labor practice, although two members of the Board still strongly adhere to the earlier view. Sand Door & Plywood Co., 113 N. L. R. B. 1210 (1955); General Drivers, 115 N. L. R. B. 800 (1956); see McAllister Transfer, Inc., 110 N. L. R. B. 1769 (1954). The Sand Door case has recently been approved by the Court of Appeals for the Ninth Circuit. *N. L. R. B.* v. *Local 1976, United Brotherhood of Carpenters and Joiners of America, AFL*, 241 F. 2d 147.

[6, 7] The reasoning in support of the Board's present position is fully set forth in the three cited decisions and

in the opinion of the Court of Appeals for the Ninth Circuit in the Sand Door case. As is there shown, the primary purpose of Congress in enacting § 8(b) (4) (A) was to protect the public interest from strikes or concerted refusals interrupting the flow of commerce at points removed from primary labor-management disputes. To allow the acquiescence of a single employer to validate conduct contrary to the express language of the statute would be to frustrate this Congressional purpose. And, as pointed out by the Board, the phrase "* * * in the course of employment" does not have the restricted meaning originally assigned to it, but rather, Congress "used this phrase only to distinguish between employees in their capacity as employees and employees in their capacity as consumers." Sand Door & Plywood Co., 113 N. L. R. B. 1210, 1217 (1955).

In the present case the Board found upon substantial evidence that there was at the time of the incidents in question no collective bargaining agreement containing a "hot cargo" clause between the subcontractors and their employees. The difficult question encountered in determining the allowable operation of such a clause in a § 8(b) (4) (A) proceeding is therefore not before us.[1] In this connection, however, the words of a former chairman of the Board are

1. The majority members of the Board are divided upon this question. One member is of the view that such clauses are "contrary to public policy." 113 N. L. R. B. 1219. "'No amount of ingenuity,'" he thinks, "'can change the simple fact that a "hot cargo" contract is nothing more than a device to immunize in advance the very conduct which Congress in response to a dire public need sought effectively to eliminate. To permit a form of legal sophistry to make possible so flagrant a subterfuge for continuing this well-known abuse in labor disputes is to make a mockery of one of the most significant provisions which Congress wrote into the Act.'" 113 N. L. R. B. 1219. The two other members of the majority, however, do not go so far. "Insofar as such contracts govern the relations of the parties thereto with each other, we do not regard it our province to declare them contrary to public policy." See 70 Har. L. R. 735 (1957); 64 Yale L. J. 1201 (1955).

worth noting: "Perhaps more than any other, this is a field in which we should tread with cautious feet in our attempt to mark the boundaries between conduct which is permissible and that which is interdicted. I have no doubt that the courts would agree that the impact of 'hot cargo' and related contract provisions upon the application of Section 8(b) (4) in varying factual situations cannot be resolved by *a priori* recourse to a sweeping generalization drawn from a single court decision applying the law to a particular set of facts." McAllister Transfer, Inc., 110 N. L. R. B. 1769, 1789 (1954).

[8] Confining our decision to the facts of the case before us we hold that the Board was correct in finding that a violation of the act was not precluded by the fact that the subcontractors as union members were obligated to observe union working rules. All the elements of a § 8(b) (4) (A) violation having been found upon substantial evidence—inducement, refusal and unlawful objective—the acquiescence of the subcontractors could not serve to immunize respondent's conduct from the operation of the statute, enacted for the protection of the public as well as for the protection of neutral employers in the position occupied by Scholz and Erie, who in no way consented in advance not to use the doors in question.

For these reasons the petition for enforcement is granted.

NLRB v. *Washington-Oregon S. W. D. C.* (*Sound Shingle* case), 211 F. 2d 149 (C. A. 9, 1954):

Before DENMAN, *Chief Judge*, and HEALY and POPE, *Circuit Judges*.

DENMAN, *Chief Judge*.

The National Labor Relations Board, hereafter the Board, petitions for enforcement of its order requiring the Washington-Oregon Shingle Weavers' District Council and

Everett Local 2580 Shingle Weavers' Union (hereafter the Union) to cease and desist from inducing or encouraging its members to engage in a secondary boycott.[1]

The main issue presented by this petition is whether a union violates Section 8(b) (4) (A) of the Labor Management Relations Act, 29 U. S. C. A. § 141 et seq. (hereafter the Act) when it refuses to allow its employees to work in an employer's plant solely because the employer is using non-union products. Subsidiary to this main issue are the following questions: (1) whether the trial examiner erred in rejecting an offer of proof by the Union; (2) whether the trial examiner erred in admitting certain exhibits; and (3) if either or both (1) and (2) be answered in the affirmative, whether the error is such as to require a denial of enforcement.

The complainant, the Sound Shingle Company (hereafter the Company) is a partnership consisting of John E. Martin and Frank S. Barker, and is a manufacturer and processor of shingles. In the latter part of January, 1951, Paul M. Sarrett, a field representative of the Union, called on John E. Martin, a Company partner, and told him that the plant would be closed if it used Canadian shingles.

On January 11, 1952, the Company received a carload of shingles from the North Shore Shingle Co., a Canadian corporation, with which it had a contract to process shingles into shakes. When the car was opened a union shop steward observed that the shingles bore no union label and remarked: "They are B. C. [British Columbia] shingles and we won't do nothing with them. We will let them sit there." Thereupon, all employees left the plant.

At a subsequent conference, representatives of the Union told Martin that he could not use Canadian shingles because they were unfair, that they (the Union) had been working

1. The Board's order also required that the customary notices be posted.

on the Canadian mills for some time. When pressed by Martin, one of the Union representatives flatly stated: "Well, O. K. For the record let us have it that way. We absolutely won't allow your boys to work on Canadian shingles."[2]

The Board found that the Union had induced and encouraged the Company's employees to refuse to work on Canadian shingles, an object thereof being to cause the Company to cease using or otherwise dealing in the products of the North Shore Shingle Company and other Canadian manufacturers, in violation of Section 8(b) (4) (A).

(A) *Rejection of Union Evidence:*

The Union offered evidence and made an offer of proof, both rejected, tending to show that Martin had had trouble with the Union over the use of Canadian shingles in the plant of another company with which he was connected and tending to show that the Union had a long standing policy regarding the protection of its union label. The Union sought to establish as a defense that its aim in inducing the employees' actions was protection of the union label. They argue that had they established these facts, the strike would have been shown to be a concerted activity for the "mutual aid or protection" of the employees and hence a protected activity under Section 7 of the Act.

[1, 2] The union label is registered as a trademark. The Union was entitled to protest its unlawful use and even to enjoin a threatened unlawful use.[3] But if an act by a union is an unlawful secondary boycott, the mere fact that it was designed to proscribe an unauthorized use of a union label will not make the action privileged. While the object of

2. This statement was also reported as follows: "Well for the record we called the boys off. We are absolutely not going to let them run on Canadian shingles."

3. See § 34 of the Act of July 5, 1946, 15 U. S. C. A. § 1116.

the union in such a case would be lawful, the means chosen to achieve that end would be contrary to Section 8(b) (4) (A) of the Act and hence not protected under Section 7 thereof. See *N. L. R. B.* v. *Wine, Liquor & Distillery Workers Union*, 2 Cir., 178 F. 2d 584, 586, 16 A. L. R. 2d 762. It is thus clear that the offer of proof and the evidence in support thereof, even if established, would not have constituted a defense to the charges made.

(B) *Admission of Exhibits:*

The trial examiner received in evidence, over objections duly preserved before the Board, articles from the "Shingle Weaver," a Union publication. These articles dealt with the Union's drive to prevent the use of non-union shingles in the United States and in general tone exhorted Union members to insist that any shingles that they work bear a union label. Particular emphasis was placed on Canadian shingles as unfair in these articles. These articles contained no threat of reprisal or promise of benefit to the employees. The Union argues that according to the plain terms of Section 8(c) of the Act, these articles can "not constitute or be evidence of an unfair labor practice".

[3] We need not consider here whether the admission of these exhibits was erroneous, for if so, the error is not sufficient to require us to deny enforcement of the Board's order. The Board did not rely upon these exhibits as direct evidence of the unlawful practice, but merely as evidence showing Union policy with regard to non-union products. There is abundant and compelling evidence to support the findings of the Board apart from these exhibits. See *N. L. R. B.* v. *Anderson*, 9 Cir., 206 F. 2d 409, certiorari denied 346 U. S. 938, 74 S. Ct. 377, 98 L. Ed. ——; *N. L. R. B.* v. *Howell Chevrolet Co.*, 9 Cir., 204 F. 2d 79, 84, affirmed 346 U. S. 482, 74 S. Ct. 214.

(C) The Merits:

The Union argues that even if the findings of fact of the Board are accepted, the Board erred, as a matter of law, in concluding that the Union's activity constituted an unlawful secondary boycott. It argues that inasmuch as the only dispute was between the Union and the Company, there could be no secondary boycott under the Act.

Section 8(b) (4) (A) of the Act proscribes a strike for the purpose of compelling an employer to cease using the products of another producer, processor or manufacturer.[4] The evidence clearly establishes that this was a strike of such character. There is no evidence that the work stoppage at the Company's plant was designed for any purpose other than to compel the Company to cease using unfair shingles produced by another.

[4, 5] The Union's argument that there was no evidence of a dispute between it and the Canadian plants is without merit. If that were true, it would not make the Union's conduct any more excusable. The prohibited object of the boycott is stated by the statute to be "forcing * * * any employer or other person to cease using * * * the products of any other producer, processor, or manufacturer * * *" That is a prohibited object whether the

4. § 8(b) (4) (A) reads in part as follows:

"Sec. 8 * * *

"(b) it shall be an unfair labor practice for a labor organization or its agents—

* * * * *

"(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing * * * any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person * * *."

union has or has not a dispute with such "other producer, processor, or manufacturer". In fact, if the object is sought, not because of any dispute, but merely because the union dislikes the other producer for any reason, or for no reason, the conduct would appear even more reprehensible. The record contains evidence of several statements of Union representatives, made directly to Company representatives, to the effect that the Canadian plants were unfair and that "we have been working on them." The only dispute between the Union and the Company was over the latter's use of unfair shingles, and had no bearing on wages, working conditions, etc. In such a case, a strike called by the Union can have no other purpose than to compel the Company to cease using what the Union considers unfair shingles.

Furthermore, the legislative history of the Act clearly shows that Congress intended to proscribe exactly the type of union action involved here. Particularly impressive is the language used by Senator Taft in condemning this type of strike in debate on the floor of the Senate.

> "Take a case in which the employer is getting along perfectly with his employees. They agree on wages. Wages and working conditions are satisfactory to both sides. Someone else says to those employees, 'We want you to strike against your employer because he happens to be handling some product which we do not like. We do not think it is made under proper conditions.' Of course if that sort of thing is encouraged there will be hundreds and thousands of strikes in the United States. There is no reason that I can see why we should make it lawful for persons to incite workers to strike when they are perfectly satisfied with their conditions. If their conditions are not satisfactory, then it is perfectly lawful to encourage them to strike. The Senator [Pepper] says they must be encouraged to strike because their employer happens to be doing business with someone the union

does not like or with whom it is having trouble or having a strike. On that basis there can be a chain reaction that will tie up the entire United States in a series of sympathetic strikes, if we choose to call them that." 93 Cong. Rec. 4198, in 2 Leg. Hist. L. M. R. A. 1107.

Also, in House Conference Report No. 510 on H. R. 3020 [the Act], the following statement is made with regard to this section:

> "Under clause (A) strikes or boycotts, or attempts to induce or encourage such action, were made unfair labor practices if the purpose was to force an employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of another, or to cease doing business with any other person. *Thus it was made an unfair labor practice for a union to engage in a strike against employer A for the purpose of forcing that employer to cease doing business with employer B.* Similarly it would not be lawful for a union to boycott employer A because employer A uses or otherwise deals in the goods of, or does business with, employer B." (Emphasis supplied.) 1 Leg. Hist., L. M. R. A. 505, 507.

Substantially the same statement was made in Senate Report No. 105 on S. 1126 [the Senate Bill], see 1 Leg. Hist. L. M. R. A. 407, 428. Here the union engaged in a strike against the Company ("employer A") for the purpose of forcing that employer to cease doing business with the North Shore Shingle Co. ("employer B"), a conduct clearly prohibited by Section 8(b) (4) (A).

[6] The Union contends that by virtue of an agreement existing between it and the company, the latter had bound itself not to work on any shingles not bearing the Union label. The Union argues that an employer may bind himself not to handle unfair goods and if he does so, a strike to enforce such an agreement is not a violation of

Section 8(b) (4) (A). Assuming without deciding that this is a proper statement of the law,[5] it is not controlling here because there is no such agreement.

In seeking such an agreement in the record, the Union points to Article VI of the 1950 labor agreement between it and the Company,[6] and to the fact that Martin had been warned that if the plant used unfair shingles it would be closed and that Martin, knowing this, entered into the bargaining agreement. This evidence does not amount to a clear showing of the agreement contended for, and if such an agreement existed, it would be a waiver of the employer's statutory protection against secondary boycott. The Board has long recognized that where such agreements are permissible, they will not be implied "in the absence of a clear and unmistakable showing of a waiver of such rights." See Tide Water Associated Oil Co., 85 N. L. R. B. 1096, 1098 and cases cited. We think this the correct principle of law to be applied.

The order of the Board is ordered enforced.

Joliet Contractors Association v. *NLRB*, 202 F. 2d 606 (C. A. 7, 1953):

Before MAJOR, *Chief Judge*, and DUFFY, and FINNEGAN, *Circuit Judges*.

MAJOR, *Chief Judge*.

Petitioners seek a review, pursuant to Sec. 10(f) of the National Labor Relations Act as amended, 61 Stat. 136, 29 U. S. C. A. § 151 et seq., of an order of the National Labor Relations Board insofar as it dismisses portions of a complaint charging Glaziers' Union, Local 27 of the

5. See *Rabouin* v. *N. L. R. B.*, 2 Cir., 195 F. 2d 906, 912.

6. Article VI reads as follows, insofar as here material:
"(c) All shingles and by-products produced fair shall not be declared unfair providing the plant does not attempt to operate unfair with fair stock on hand."

Brotherhood of Painters, Decorators and Paper Hangers of America (hereinafter referred to as the Union), and its agents, George H. Meyers (now deceased) and John R. Hoffman, with violations of Sec. 8(b) (4) (A) of the Act. Previously, the Board had dismissed the complaint on the ground that the activities involved did not have a sufficient impact on commerce to justify the Board in exercising jurisdiction. On petition to review, this court set aside such order and remanded the case to the Board "for such further proceedings as may, under the Act, be appropriate." *Joliet Contractors Ass'n* v. *National Labor Relations Board*, 7 Cir., 193 F. 2d 833, 844.

As shown in our previous opinion, the Board, pursuant to Sec. 10(*l*) of the Act, after a hearing in the United States District Court for the Northern District of Illinois, obtained an injunction against the Union restraining the alleged unfair labor practices pending final adjudication. The testimony heard in the court proceeding was, by stipulation, utilized by the Trial Examiner and the Board in deciding the case on its merits. Subsequent to our previous decision, no further report was made by the Trial Examiner and no additional testimony was heard by the Board. We think it may be safely asserted that no serious controversy exists as to the facts which are set forth in some detail on the first five pages of our previous opinion and no good purpose could be served in their repetition other than as they may bear upon certain matters to be subsequently discussed. In this court the Union was permitted to intervene, filed its brief and participated in the oral argument.

At this point, it is sufficient to note that the gravamen of the petitioners' contention is that the Union and its agents engaged in a comprehensive boycott campaign to eliminate the use of preglazed building materials in the Joliet construction area and that its entire course of con-

duct from the time it initiated such campaign in January 1948 until restrained by the United States District Court in November 1948 was directed to the accomplishment of this boycott objective. It is contended that pursuant to such objective the Union employed many coercive tactics and means, such as its announced ban against the use of preglazed sash, by its by-laws and working rules which prohibited work on jobs or for contractors using preglazed sash, by its refusal to assign or permit glaziers to work on jobs which the Union designated as "unfair" and that it caused work stoppages and work refusals by glaziers where the contractors on jobs were "unfair." And it is argued, contrary to the decision of the Board, that each of these activities, being component parts of an over-all objective, constitutes a violation *per se*.

In view of the conclusion which we have reached, it would be futile to devote any great amount of effort to this phase of the controversy. This is so notwithstanding the record discloses beyond doubt that the objective of the Union and its agents was to prohibit the use of preglazed sash in the Joliet area and that a carefully devised plan was formulated for the purpose of accomplishing that result. The Union's by-laws and working rules, its announcement of unfair lists of contractors and material dealers who refused to comply with the Union requirement, and its refusal to furnish glaziers to those on the unfair lists, were all elements of a grandiose plan to accomplish the Union's objective.

[1-2] Even so, the conduct and activities of the Union, including those which we have mentioned, do not constitute an unfair labor practice either when considered separately or in their entirety unless prohibited by the language employed in Sec. 8(b) (4) (A) of the Act. The legislative history of this provision is much relied upon by petitioners as demonstrating the congressional intent to make un-

lawful, conduct by unions commonly referred to as the secondary boycott, directed at either an employer or the products of any person. We have read this history, and the cases indicate that many other courts have done likewise, and we think it can be admitted that it furnishes plausible support for numerous of the contentions advanced by petitioners. We see no point in reviewing it because we find ourselves of necessity returning to the language which Congress embodied in the provision. Regardless of the congressional purpose or the objective sought to be accomplished by the legislation, it is the law which Congress finally enacted by which the merits of the controversy must be determined. The section, so far as here material, provides:

> "(b) It shall be an unfair labor practice for a labor organization or its agents—
>
> • • • • •
>
> "(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to • • • handle or work on any • • • materials • • • or to perform any services, where an object thereof is: (A) forcing or requiring • • • any employer or other person to cease using • • • or otherwise dealing in the products of any other producer • • • or to cease doing business with any other person • • •."

It is evident from this unambiguous language that a union is proscribed only from engaging in or inducing or encouraging employees to engage in a strike or a concerted refusal in the course of their employment to handle or work on any materials or to perform any services where an object thereof is to force or require any employer or other person to cease using or otherwise dealing in the products of any other producer or to cease doing business with any other person. More specifically, the objective sought to be accomplished by the union, while material,

is alone not sufficient; it only becomes a violation when achieved in the manner specified, that is, by engaging in a strike or by inducing or encouraging employees to do so or to engage in a concerted refusal in the course of their employment. While we agree, for reasons subsequently stated, that the Union activities referred to might furnish the inducement or encouragement for employees to strike or to engage in a concerted refusal to work, yet this would not constitute a violation in the absence of such strike or concerted refusal on the part of the employees "in the course of their employment." The objective must be accomplished by the specific means which the section defines and not otherwise.

We therefore agree with the Board that the Union by-laws and working rules are not illegal *per se* because they are not the means which are inhibited by the statute, and the same is true of the Union's designation of certain contractors as unfair. The most that can be said, as we have observed, is that they may furnish the inducement or encouragement for a strike or concerted refusal to work, but at least until they have done so they are not contaminated with illegality. We also agree with the Board that the mere refusal on the part of the Union to permit its members to work on a job where preglazed sash is used, or a concerted refusal on the part of the employees to do so, does not come within the condemnation of the statute. This is so because the plain language limits the activities to "employees * * * in the course of their employment." We agree with the view that employees cannot be on a strike or engaged in a refusal "in the course of their employment" prior to the establishment of an employer-employee relationship. If Congress had intended to proscribe the refusal to accept employment, either individually or in concert, it no doubt would have employed language appropriate to accomplish such purpose. We suspect that

Congress deliberately refrained from so doing in order to escape a serious constitutional challenge. At any rate, we would doubt the power of Congress to make the refusal to work an unfair labor practice. So far as we are aware, people have a right either as individuals or groups to refuse to work for any reason which they may regard as sufficient or for no reason. It is only after the employer-employee relationship has been established that Congress has prescribed a code of conduct for both employer and employee in which it has specifically designated that which constitutes an unfair labor practice on the part of the parties respectively.

We think the decisions of the Supreme Court sustain the view that the heart of Sec. 8(b) (4) insofar as it brings a union within its terms is that either the union must engage in a strike or that it induce or encourage employees to do so or to engage in a concerted refusal to work in the course of their employment. In *National Labor Relations Board* v. *International Rice Milling Co., Inc.*, 341 U. S. 665, 71 S. Ct. 961, 95 L. Ed. 1284, the case turned, as we understand the opinion, upon the proposition that the union did not induce or encourage the employees of the neutral employer to engage in a concerted refusal because there was only one of such employees involved. The court stated, 341 U. S. at page 670, 71 S. Ct. at page 964:

> "A sufficient answer to this claimed violation of the section is that the union's picketing and its encouragement of the men on the truck did not amount to such an inducement or encouragement to 'concerted' activity as the section proscribes."

And on the following page, 341 U. S. at page 671, 71 S. Ct. at page 964, the court stated:

> "A union's inducements or encouragements reaching individual employees of neutral employers only as they happen to approach the picketed place of business gen-

erally are not aimed at concerted, as distinguished from individual, conduct by such employees."

In *Local 74, United Brotherhood of Carpenters & Joiners of America* v. *National Labor Relations Board*, 341 U. S. 707, at page 713, 71 S. Ct. 966, at page 970, 95 L. Ed. 1309, the court stated:

> "The statute did not require the individual carpenters to remain on this job. It did, however, make it an unfair labor practice for the union or its agent to engage in a strike, as they did here, when an object of doing so was to force the project owner to cancel his installation contract with Watson's."

So in the instant situation the statute did not condemn the refusal by glaziers to go on a job and it did not require them as individuals to stay on a job. What it did do was to make it an unfair labor practice for the Union or its agents to induce or encourage glaziers to concertedly refuse to work in the course of their employment where an object of such refusal was to force any employer to cease using or selling preglazed sash.

In *National Labor Relations Board* v. *Denver Building & Construction Trades Council*, 341 U. S. 675, at page 687, 71 S. Ct. 943, at page 951, 95 L. Ed. 1284, the court in distinguishing and commenting on the Rice Milling Co. case stated:

> "The union did not engage in a strike against the customer. It did not encourage concerted action by the customer's employees to force the customer to boycott the mill."

Both the Board and the Union, so we think, place too much emphasis upon the contention that the activities of the Union and its members were primary and, therefore, permissible under the Act. Closely allied with this contention is the argument that the Union was engaged in the rightful endeavor to obtain more work for its members

by preventing the use of preglazed sash on the job. In this connection it is pointed out that the Union glaziers were employees of glazing contractors, of which there were only two in the Joliet area, and that there was no dispute between the glaziers and their employers regarding its use, in other words, that the activities of the Union and its glazier members were primary in nature and cannot properly be designated as a secondary boycott. Whatever merit there may be in the premise upon which this argument is predicated, the fact remains that the target was the use of preglazed sash, and any and all who handled, used or sold such sash were the intended and in many cases the actual victims of the Union's course. Moreover, we are not convinced that a Union violation of the provision under discussion is dependent upon whether its activities are primary or secondary. In the Rice Milling Co. case, the Court of Appeals, 5 Cir., 183 F. 2d 21, 26, stated:

> "The statute clearly provides a remedy for the type of conduct engaged in by the union, without resort to any distinction between primary and secondary activities. If the union's activities come within the language of the statute, they constitute an unfair labor practice, regardless of whether they might have been considered a true 'secondary boycott' under the old common law or under any of the modern and popular theories."

While the Supreme Court reversed the Court of Appeals, it did not do so by distinguishing between primary and secondary activities, but on the basis, as already noted, that there was no encouragement or inducement by the union of concerted activity which the Act proscribes. 341 U. S. 665, 670, 71 S. Ct. 961, 95 L. Ed. 1284.

In the Denver Building Council case, the Court of Appeals, 87 U. S. App. D. C. 293, 186 F. 2d 326, 337, refused enforcement of the Board's order on the ground that the

union activity was primary and not secondary. The Supreme Court reversed the Court of Appeals and directed enforcement of the Board's order irrespective of the primary nature of the dispute. In doing so the court stated, 341 U. S. 675, 687, 71 S. Ct. 951.

> "At the same time that §§ 7 and 13 safeguard collective bargaining, concerted activities and strikes between the primary parties to a labor dispute, § 8(b) (4) restricts a labor organization and its agents in the use of economic pressure where an object of it is to force an employer or other person to boycott someone else."

It was the object of the strike on the part of the union which the court found to be an unfair labor practice. Relative thereto the court stated, 341 U. S. at page 689, 71 S. Ct. at page 952:

> "It is not necessary to find that the *sole* object of the strike was that of forcing the contractor to terminate the subcontractor's contract. This is emphasized in the legislative history of the section."

So in the instant situation it is not necessary to find that the sole object of the Union was that of preventing the use of preglazed sash. It is sufficient if that was one of the objects sought to be accomplished, providing, of course, the Union in the accomplishment thereof used a means which the statute designates, that is, by engaging in a strike or by the inducement or encouragement of glaziers to engage in a strike or a concerted refusal to work in the course of their employment.

[3] This brings us to a consideration of some of the specific incidents the facts of which petitioners contend constitute a violation of the Act. The Board found a violation in what is referred to as the Grant Hardware incident and exonerated the Union with reference to all others.

Predicated upon the violation found, the Board ordered that the Union

> "1. Cease and desist from applying its by-laws in such a manner as to induce and encourage the members of Local No. 27, or otherwise inducing or encouraging the members of Local No. 27, to engage in a strike or a concerted refusal in the course of their employment to perform services for Joliet Paint and Glass Co., or any other employer, where an object thereof is to require their employer or any other employer or other person to cease doing business with any other employer or any person who uses or sells preglazed sash, or has used or sold preglazed sash."

We are of the view that the restraint thus imposed upon the Union embodies substantially all the relief to which petitioners are entitled, and no good purpose could be served in considering each incident separately with a view of determining whether it constitutes a violation. In other words, it is not discernible how it would make any difference in the form of the order whether it was predicated upon one violation, as the Board found, or other violations which we think the Board should have found.

We shall, therefore, refer to a few incidents for the purpose of illustrating our disagreement with the Board. As to the Grand Hardware incident, the Board in its decision states:

> "Briefly, the record shows that three glaziers employed by Joliet Paint and Glass Company were engaged in installing plate glass store fronts for Grant Hardware Company, Mazzucco Construction Company having been the general contractor on the project, when they observed preglazed sash on the second floor of the building. Berger, one of the glaziers, called union agent Meyers in Chicago and told him the circumstances. Meyers said: 'You know the conditions of the job and you know the Union rules. Do what is right.' The three glaziers then refused to do the glaz-

ing work until Mazzucco agreed to remove the offending preglazed sash, procure new sash, and have it glazed by the glaziers. We agree with the Trial Examiner that in their context, including the existence of the Union's by-laws, Meyers' response was intended and calculated to induce and encourage Joliet's employees to cease work."

Following this the Board states:

"The remaining incidents each generally involve activity by the Respondent Union similar to that indulged in in the Grant Hardware incident. However, each fails in one or more respects to contain *all* the elements of an 8(b) (4) (A) violation."

The Board proceeds:

"Thus, the Bockholdt incident, discussed in the Intermediate Report, contained no overt inducement or encouragement of any employees by the Respondent Union. The glaziers removed glass from 2 preglazed doors without instructions from either their employer or the Union. Only the mere existence of the by-laws of the Union could constitute inducement and encouragement. However, as already indicated, the by-laws do not, standing alone, constitute inducement and encouragement within the meaning of the statutory prohibitions."

[4] We are unable to comprehend, much less agree, that the by-laws standing alone do not constitute inducement or encouragement within the meaning of the Act. In our previous opinion, 193 F. 2d at pages 835, 836, we set forth material provisions of the Union by-laws as well as testimony by Union officials as to their purpose and use. For instance, the president of the Union testified that it is the "obligation of the members, not to do any work on the job where glazing is not done on the job. * * * If a member violates that provision he is subject to disciplinary action." These by-laws constitute more than an inducement

or encouragement to its members. They are a command both to refuse employment where preglazed sash is used and to cease work when its use is discovered, and a Union member is subject to penalty if he neglects or refuses to comply with this Union edict. We think it borders on the absurd to reason that this encouragement or inducement element is present only when an agent of the Union informs or calls to the attention of the member what the by-laws require. Certainly the members know what the by-laws require and they have no choice but to refuse to work when discovery is made that preglazed sash is being used.

In *International Brotherhood of Electrical Workers* v. *National Labor Relations Board*, 341 U. S. 694, 71 S. Ct. 954, 958, 95 L. Ed. 1299, the court analyzes and discusses the meaning of the words "induce or encourage" as used in the Act. In doing so the court states, 341 U. S. at page 701, 71 S. Ct. at page 958:

> "The words 'induce or encourage' are broad enough to include in them every form of influence and persuasion."

We have already agreed with the Board that the Union by-laws *per se* do not constitute a violation but we disagree with the Board in its holding that they do not constitute the inducement or encouragement which is an element essential to a violation. We hold that they do and that the facts of the Bockholdt incident constitute a violation.

The Board refers to the Ice incident and the Sears Roebuck incident, and concludes that there was no violation because in each case there was only one employee involved, that is, one employee who was on the job and refused to work when preglazed sash was discovered. In view of what we have heretofore said, we agree with the Board that in such situations an essential element is lacking, that is,

a concerted refusal on the part of employees in the course of their employment.

As we study this record we are increasingly impressed with the numerous apparent incongruities which abound in the reasoning of the Board, and which we must admit this opinion does little to eliminate. For instance, if two or more glaziers refuse to accept employment because of the use of preglazed sash there is no violation as they have not concertedly refused to work in the course of their employment. However, if they discover the use of preglazed sash after they are on the job and then refuse to work, it is a violation because they have done so in the course of their employment. At the same time, if there is only one glazier on each of several jobs and they each refuse to work, it is not a violation because their refusal is not concerted. These incongruities and others which could be mentioned are unavoidable because of the plain unambiguous language employed by Congress in enumerating the elements required to constitute a violation.

The Board failed to find that respondent Hoffman was an agent of the Union and it is suggested that we should do so. We do not see any materiality in the point inasmuch as the cease and desist order which the Board has entered is directed at the Union "and its agents." If the order should be violated, we suppose that all agents who are responsible therefor would be liable, and if that contingency should arise it will be time enough to determine Hoffman's responsibility.

While, as noted, we have disagreed with the reasoning of the Board in one material respect, it is not discernible how that disagreement requires any modification of the Board's cease and desist order. The Union by-laws not being illegal *per se*, we think that neither the Board nor this court could order their discontinuance. At the same time, in

view of what we have held, their continued use would seem to be a hazard for the Union because they in themselves constitute one of the required elements, that is, inducement or encouragement on the part of the glazier employees.

The petition to review and modify the order of the Board is denied.